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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 212.

THE WILLIAM W. BIERCE COMPANY, LIMITED,
A CORPORATION, APPELLANT,

vs.

CLINTON J. HUTCHINS, TRUSTEE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

REPLY BRIEF FOR APPELLEE.

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I.

The Findings of the Trial Court Were Reversed by the Supreme Court.

Thus, finding 6 (R., 267) was—

> "That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof."

The Supreme Court in its opinion expressly hold the contrary, saying (R., 298):

> "but, in our opinion, the contract in the present case is not such as to prevent a severance of the price of the lienable items from the price of the non-lienable items."

And the court proceeds to fully discuss that proposition.

Again, finding 4 (R., 267) asserts that the payment of $10,000 cash, under the contract of March 13, 1901, and the giving of the note for $37,044.53, secured by the bonds of the Kona Sugar Company, Ltd., was in settlement of the previous contract of February 21, 1900,

> "and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for."

The opinion of the Supreme Court (R., 298) plainly expresses its understanding to the contrary by saying:

> "The total amount, including the cash and the note under this arrangement, was $47,044.53. The aggregate amounts under the first arrangement, it is said, would be about $45,000. Probably the difference between these two amounts covered expenses that had occurred meanwhile for storage or otherwise. The first of these contracts is made a portion of the second by express reference. They must be construed together. The first shows that the price for at least a portion of the lienable materials may be ascertained."

Finding 7 is:

> "That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted."

But the opinion of the Supreme Court (R., 298, and in full accord with the plaintiff's original pleadings) treats the con-

tract of March 13, 1901, as a "supplementary contract," and further holds, as noted above, that "they must be construed together."

Findings 11, 12, and 13 relate to the matter of election, and on which the Supreme Court's original opinion was based, with resulting reversal.

Findings 8 and 9 (R., 268) hold the contract of March 13, 1901, a conditional sale, and not a chattel mortgage or absolute sale, with lien reversed in the vendor. Yet, in the opinion of the Supreme Court on rehearing, it was expressly said (R., 306-307):

> "For the purposes of the original decision it was assumed that the contract was one of conditional sale or, perhaps more accurately speaking, that it was an executory contract to sell upon condition precedent. We will proceed upon that presumption for the purposes of the present decision also, although it may not be out of place to state that in the opinion of a majority of the court the sale was absolute and therefore replevin could not be maintained in any event."

There were forty-six separate exceptions brought before the Supreme Court of Hawaii (R., 235). They are sufficiently described for present purposes by the index to the Record, thus:

> "Defendant's exception I to ruling of Circuit Court granting leave to plaintiff to amend its complaint.
>
> "Defendant's exceptions II-XVI to rulings of Circuit Court on admission and rejection of evidence.
>
> "Defendant's exception XVII to ruling of Circuit Court on question of election, etc.
>
> "Defendant's exception XVIII to finding and judgment of Circuit Court.
>
> "Defendant's exceptions XIX-XXXIV to findings of fact by Circuit Court.
>
> "Defendant's exceptions XXXV-XLII to conclusions of law by Circuit Court.
>
> "Defendant's exception XLIII to decision of Circuit Court.

"Defendant's exceptions XLIV-XLV to entry of judgment by Circuit Court.

"Defendant's exception XLVI to ruling of Circuit Court denying defendant's motion for a new trial."

In its original opinion (R., 293) the Supreme Court opens by saying:

> "This is an action for replevin of certain rails, cars, locomotives, equipments and materials of a railroad on the plantation of the Kona Sugar Co., Ltd., all of the property of which company had been purchased by the defendant at a receiver's sale. The plaintiff had delivered this railroad property to the company under an agreement claimed by the plaintiff to be a conditional sale, and so held by the trial judge who heard the case, jury waived, and rendered judgment for the return of the property and $1,030 damages and an alternate judgment for $22,000 in case the property should not be returned. The case is brought here by the defendant upon numerous exceptions. It has been argued and briefed at considerable length upon many points, but, in the view that we take, it will be sufficient to decide the single point as to whether the plaintiff is estopped from bringing this action of replevin, based on the theory that the title to the property is in itself for the reason that it had previously elected to pursue an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a material man's lien for the same, on the theory that the title to the property had passed to the vendee, the Kona Sugar Company."

The opinion concludes (R., 299) that, as the facts are undisputed upon the question of election as thus ruled by the court, "under such circumstances this court may reverse *the "findings and judgment* of the trial court, and it does so in this case."

Adding:

> "The exceptions, so far as they raise the question of election, are sustained, the judgment of the trial

> court is reversed and the case is remanded to that court for such further proceedings as may be proper."

This was all-sufficient and would necessarily result in a new trial.

After the rehearing and decision thereon, however, and upon the plaintiff's own motion (R., 315-316) the court modified its order so as to provide that the judgment below "is hereby reversed and the exceptions, in so far as they raise the question of election are sustained, and the said cause is hereby remanded to the said circuit court with direction to dismiss the plaintiff's petition with costs."

From the foregoing, it is evident that the court in no manner sustained the findings of the trial court, and did not pass upon any of the numerous exceptions raised thereto, because, as expressly stated in its original decision, there was no need of so doing, inasmuch as on the question of election the court below had erred, and the judgment must accordingly be reversed and remanded on the exceptions raising that question for new trial. Such reserval necessarily put the matter at large, for it vacated the judgment entered at the first trial. When these appellants, on their own motion, asked for a full and final judgment, they certainly cannot be heard to say that the effect of the judgment so entered was an express approval of all other findings (or indeed of any finding of the court below) by the Supreme Court.

Now, this general judgment for the defendant is here for review, and it is plain the Supreme Court did not affirm any of the findings of the trial court. It is manifest that there is, in no form in this case, *any* statement of the facts such as is required by the Practice Act and the proper procedure thereunder, as repeatedly held by this court.

The judgment for defendant is here for review. The opinions below simply enlighten this court as to the grounds on which the judgment was based, but such judgment may

be founded on a wrong reason, although from a full and proper statement of the case, as required by the Practice Act, it may be obvious, nevertheless, that the judgment itself was right. Hence the necessity for such statement of facts, which will enable this court to determine whether, upon the facts thus stated, the judgment was correctly rendered. It will be noted, as recited in the opening paragraph of the original opinion of the Supreme Court, that numerous exceptions were argued, but that the court did not rule thereon either way, resting its judgment of reversal, in the first instance, upon the matter of election.

The failure or refusal of the Supreme Court to make the statement of facts required certainly cannot operate to the prejudice of the appellee. With the reversal of the findings and with no statement of the facts certified here to this court by the Supreme Court of Hawaii in any form, final action here now could result only in the affirmance of the judgment.

This is in precise accord with the rule announced in *Gray v. Howe* (108 U. S., 12), well stated by the syllabus as follows:

> "Where the Supreme Court of a Territory on appeal reverses the judgment of a district court and sets aside findings of fact, and makes no new statement of facts in the nature of a special verdict, the judgment of the Supreme Court of the Territory must be affirmed on appeal."

And the rule is stated with admirable clearness in *Hecht v. Boughton* (105 U. S., 235, 236) thus:

> "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions or questions of law otherwise presented by the record; *and upon an appeal to the statement of fact and rulings certified by the court below.* The *facts set forth in the statement which must come up with the appeal are conclusive on us.* Under these circumstances, the form of proceeding to get a re-

> view is not of so much importance as certainty about what is to be done."

Citing *Stringfellow v. Cain* (99 U. S., 610), wherein (pp. 613-614) this court said:

> "Under this act, if the findings of the district court are sustained by the Supreme Court and a general judgment of affirmance rendered, the findings of the district court, thus approved by the Supreme Court, will furnish a 'statement of the facts of the case,' for the purposes of an appeal to this court. The same will be true if there is a reversal, for the reason that the facts as found are not sufficient to support the judgment. But if, as in this case, the judgment is reversed because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing in this court on appeal."

This is precisely the situation here. Plainly the findings and judgment are reversed, and as plainly there is no "statement of facts and rulings certified by the court below."

The same rule is reaffirmed in *Salina Stock Company v. Salina Creek Company* (163 U. S., 109, 117-118).

Marshall v. Burtis, 172 U. S., 630.

Cohn v. Daley, 174 U. S., 539.

II.

The Original Lien Was Filed and Pursued with Full Authority and Full Knowledge.

A. W. W. Bierce, President of the company since its organization, in December, 1899, states (R., 77) that—

> "Messrs. McKinney and McClanahan were the attorneys in fact of the corporation and had been since some time in 1901—about March 13, 1901."

McClanahan testifies that the matter had been left entirely with his firm (R., 98).

> "Q. To take such action and steps as you saw fit and proper in the premises?
> "A. Absolutely, absolutely.
> "Q. The lien was filed when?
> "A. The lien was filed three days before the committee's agreement was entered into, on May 12, 1902."

The motive for filing the lien appears from the witness' statement that (R., 96)—

> "When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lienholders were preferred over certain other holders."

Again (R., 98) he says:

> "Q. The lien was filed when?
> "A. The lien was filed three days before the committee's agreement was entered into, on May 12th, 1902.
> "Q. Three days before what?
> "A. Notice of lien was filed three days before the date of the agreement among the creditors, which was dated May 15th, 1902. That would make the lien having been filed on May 12th, the notice of lien on May 12th, 1902. On August 1st, 1902, suit was brought. * * * Lien suit was brought on the first of August, 1902, discontinued on the 25th of January, 1903, at a time when things were chaos and everybody given up; in fact the bondholders had determined to write their bonds c[illegible]t that time, absolutely total loss."

November 24, 1902, petition for intervention in the receiver's suit was filed by the Bierce Company (R., 257-265). In that petition the original contract between these parties, of February 21, 1900, was plead, paragraph IV of the petition averring:

> "That under and by virtue of SAID CONTRACT this intervenor furnished to the said Kona Sugar Company, Ltd., in accordance with the terms of said contract and at the price agreed upon in said contract, certain goods, merchandise and materials, which by the terms of said contract this intervenor was obliged to furnish to the said Kona Sugar Company, Ltd."

And by paragraph V it was averred that the materials thus furnished would be used, and in fact were used, by the Sugar Company "in the construction and equipment of a certain railroad located on the plantation of the said Kona Sugar Company, Ltd.," etc.

Paragraphs VI and VII set forth the filing of the notice of lien on May 14, 1902; the bringing of suit on August 1, 1902, "for the purpose of enforcing said lien upon the property hereinabove and in the notice of lien demanded; that said suit is still pending and undetermined," etc.

By paragraph VIII it was averred that the Bierce Company "is the holder and owner" of $45,000 worth of the first-mortgage bonds of said Kona Sugar Company, "*which said bonds are secured by a mortgage upon all of the property of the said Sugar Company, Ltd., including that property herein below, in paragraphs XI and XII of this petition and intervention, more fully referred to and described.*"

Paragraphs IX, X, XI, and XII then recite the decree in the receivership cause (wherein the petition under discussion was filed) for the *sale* of the property of the Kona Sugar Company, expressly including the railroad and equipment and all the property of every kind of the Kona Sugar Company by detailed description.

Paragraph XIII then avers:

> "That each and all of said property thus decreed by the said court to be sold as aforesaid, and advertised by the said F. L. Dortch, as receiver of the Kona Sugar Co., Ltd., to be sold in the manner and form above set forth, *is the same property which was conveyed by mortgage to secure to this intervenor,*

> *amongst others, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein.*"

And paragraph XIV thereon prays, in terms and at length, a modification of the decree of sale in the various parts thereof where such modification was essential, so that it would read (R., 263):

> "Saving and excepting from said sale and from the operations thereof all liens, rights, claims and interests as hereinabove set forth."

In short, the decree, through four separate subdivisions under paragraph XIV, specifically prayed such amendment of the decree of sale as would by repeated expression make it absolutely clear that the sale was made saving and excepting therefrom and from the operation thereof—

> "all liens, rights, claims and interests of whatsoever name or nature of all bondholders, and of all persons claiming, asserting, or seeking to enforce any lien of whatsoever name or nature, in, to, or against the aforesaid property or any part thereof" (R., 262-263).

No action appears to have been taken on this petition, although noticed for hearing November 24, 1902 (R., 256).

The appellant here, by this recital of paragraph XIII of the petition, however, distinctly pleads that this property was covered by the mortgage on which the bonds held by it *and others* was secured. The case, therefore, is wholly within the facts and conclusion thereon announced by this court in *Van Winkle v. Crowell* (146 U. S., 42), which was an action in replevin, and wherein this court (Op., 51) said:

> "Moreover, it is shown that, prior to the commencement of the present suit, the plaintiffs, in May 1886, filed a mechanics' lien as respected the ma-

> chinery made under the contract of March 28, 1885, admitting a credit for the $2,500. and the $500., and claiming a lien under said contract and under the three notes of December 11, 1885; and in July, 1886, they commenced a suit in the court of the State of Alabama to enforce that lien; and that that suit was dismissed by the plaintiffs without a trial on the merits, before the trial of the present suit was had. *The assertion of that lien treated the property as the property of Belser and Parker, and did so after the notes of December 11, 1885, were taken.* It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property to Belser and Parker as unconditional."

February 3, 1903, the Bierce Company petitioned for leave to bring a statutory action of replevin against the receiver, which petition was denied by the Circuit Court (R., 210) on the ground that notice to the trustee under the mortgage and other parties who had filed material men's liens should be given. The court concluded:

> "The mere fact of granting the motion is sufficient to divest the receiver of the possession of the property and to vest the possession of the same in the plaintiff—nor is the fact that the plaintiff tendered a bond to the Kona Sugar Company, Ltd., sufficient to warrant an *ex parte* proceeding in the premises. As the said parties appear not to have had notice of the said motion and the hearing, the said motion is denied."

The order is dated February 5, 1903.

Thereupon, about February 26, 1903, the Bierce Company filed a petition in intervention, setting up for the first time (R., 215, paragraph XIII) *"a supplemental contract in writing"* of March 13, 1901, describing the property delivered and claiming title for the first time under the theory of conditional sale, and praying (R., 218) ascertainment of amount due the Bierce Company and decree that same

should be paid by the receiver "within a short day to be fixed by this court in said decree" (meaning the foreclosure decree); or, "upon the failure to pay within the short day fixed as aforesaid, deliver the said engines, cars and other railroad equipment and each and every portion thereof, as set forth in paragraph XIV of this petition, to your petitioner," and upon delivery, in turn, by petitioner of the promissory note of the Kona Sugar Company and all collateral security held by petitioner thereunder.

This petition was allowed on motion to be filed by the court and the receiver allowed to be made a party (R., 202 and 208). The attorney-in-fact for the Bierce Company (McClanahan) states (R., 99), concerning this petition, that—

> "Our suit in intervention was in the nature of an equitable replevin, which was filed after we had been denied the right to bring legal replevin against the receiver. We petitioned to be allowed to intervene for the purpose of bringing equitable replevin against the receivers."

With this petition pending and on April 20, 1903, (R., 220-224) "decree and order of sale of all the estate and property of the Kona Sugar Company, Ltd.," was entered.

On June 1, 1903, the same court entered an "order confirming same" (R., 225).

From the order of April 20, 1903, directing the sale and prescribing the terms thereof, the Bierce Company took out a writ of error to the Supreme Court of the Territory (R., 227, 228), setting forth therein its petition in intervention of February 26, 1903, "for the recovery of certain specific property" in the hands of said F. L. Dortch, as receiver of the said Kona Sugar Company, Ltd., giving notice to all of the defendants in error thereof, and that—

> "a writ of error in the above-entitled cause has issued from the Supreme Court of the Territory of Hawaii

> to the Circuit Court of the Third Judicial Circuit of said Territory, sitting at chambers as a court of equity" (Rec., 229-230),

together with full assignment of errors setting out at length the decree and order of April 20, 1903, and specifying, among other errors, the inclusion in said decree and proposed offering for sale thereunder of the goods, chattels, and effects in the possession and under the control of the receiver, "which were the subject-matter of plaintiff in error's suit in intervention filed in said court on the 26th day of February, 1903, to wit," and specifically describing the rails, equipment, etc., as set forth in said petition.

This writ of error was brought on August 25, 1903; was duly allowed and was duly served, and the decree below affirmed (16 Haw., 258). All of this proceeding for the writ of error is *subsequent* to the filing of this replevin suit, which was begun against the purchaser at the foreclosure sale (Hutchins, trustee and appellee here) on *July 20, 1903,* followed by attachment of the property described in the complaint therein and execution of return bond on July 21, 1903 (R., 37-49).

The original complaint set up the contract of February 21, 1900, under which the material was purchased and described the contract of March 13, 1901, as "a supplementary contract in writing," these words being by an amendment (R., 51) stricken from the complaint, although the same words are used in the petition of February, 1903 (R., 215, paragraph XIII).

The answer of defendant Hutchins, trustee (R., 49), admits his purchase under the foreclosure decree in the receivership suit, which was, "on or about the 9th day of ——, 1903, sold to this defendant *free and clear of all encumbrances.*"

The answer affirmatively pleads that the property was the property of the Kona Sugar Company and "was part of the

assets then and there sold to this defendant;" and also *denies*, "except as hereinbefore admitted, qualified, or alleged," the truth of the facts stated in the complaint.

Notice read at sale under decree of foreclosure (R., 179), Exhibit A to testimony of Alex. Lindsay, Jr., as read by him thereat, viz, May 9, 1903.

This notice states, with description of the property:

(1) That the Bierce Company is the owner "of the following articles of railroad equipment at the present time being used on the plantation of the Kona Sugar Company, Ltd., as a plantation railroad." (Here follows description of the rails, spikes, engines, cars, etc.)

(2) That such articles are merely temporarily and wrongfully in the possession of the Kona Company and the receiver.

(3) "The said Wm. W. Bierce Co., Ltd., has taken and is now prosecuting legal measures against the Kona Sugar Company, Ltd., F. L. Dortch, the receiver of said company, and other interested parties, to regain the said property above described and all portions thereof.

(4) That the Kona Sugar Company and the receiver have no right to or interest therein, and any purchaser at the sale of the property of the Kona Sugar Company, Ltd., "will obtain no title therein or thereto or in or to any part thereof."

(5) That said company protests against the sale of said articles "or any part thereof" and gives notice that it will at once taken legal steps to regain possession of said property from any person or persons who shall take or attempt to take possession thereof or "to exercise or claim any right, title or interest of any sort therein or thereto."

Hutchins became a purchaser at the sale, as trustee for the creditors. It should be remembered that, from the time of the purchase and delivery of this material and equipment to the Kona Company, it had been put into necessary use

as part of the sugar plantation (to wit, in 1901). Down to January, 1903, the constant and consistent claim upon the record and the attitude of the appellant was that title had passed by the delivery of this material to the Kona Company, and the appellant had sought (1) by lien filed in May, 1902, followed by suit in August, 1902, to assert a lien against the entire property into which it had been merged by construction of railroad and use of equipment, and (2) by its petition filed in the receivership suit in November, 1902, so expressly admitting; asserted its then interest as the holder of bonds secured by a mortgage, which by the express terms of said petition *admittedly covered this identical property,* and (3) prayed that the decree for sale and sale thereunder should be made, saving all liens, including, of course, its own. By the lien and suit thereunder and the petition of November, 1902, it therefore stated the *legal effect* which it ascribed to the original contract of February, 1900, and the supplementary agreement of March, 1901. All other general creditors and all bondholders had therefore distinct notice during all that period of the exact status taken by this appellant; of its full pleading, showing by clear intention its acquiescence in the ownership and possession by the Kona Sugar Company and its receiver of this material and property, and its assertion of a due claim of protection thereto, 1st, by the lien, and, 2d, as a holder of the mortgage bonds, which its own petition and pleadings in terms declared covered this identical property.

With the case in this attitude when the decree for final sale was passed, it is manifest that the general creditors and other bondholders were entitled to rely upon the facts thus solemnly plead by the appellant, and the legal position which it had, both in the lien suit at law and by its petition in the foreclosure suit in equity, consistently and fully taken. Certainly estoppel by formal pleading, if applicable in any case, is so applicable here. A party cannot blow hot and

cold. Certainly this appellant could not take twice over the same position, and by its procedure in court, both at law and in equity, declare the property to belong to the Kona Company and rightfully to be sold under the decree of foreclosure, but with saving of the lien asserted thereto in its favor, and afterward abandon such pleading and admission. The lien went to an appropriation *pro tanto* of the proceeds of the sale; the property was thus offered as a going concern, with the railroad and its equipment an integral and most essential part of this sugar plantation. *Now*, by the replevin proceeding, the appellant seeks to take away the property itself from the purchaser, who, as trustee, represented the general creditors, and despoil the estate, with consequent large destruction of its value, by such retaking.

By enforcement of the lien the proceeds of sale would have been diminished *pro tanto* and the appellants would have been thereby paid out of the fund derived from the sale; but the proceeding in replevin would result in taking the property thus sold away from the purchaser, to the loss and injury of the general creditors, who had become such, relying upon the lien, record, etc., made by the appellants, and hence manifestly to their most serious injury. It is plain that the effect of the replevin suit is to the direct injury of the general creditors, purchasers at foreclosure sale. They necessarily stand in the shoes of the Kona Company and its receiver; they take whatever rights the Kona Company and the receiver had. Certainly the receiver, as representing both the company and all the creditors (for whom he was in fact trustee), had the right to rely upon the full legal effect of the lien and suit thereunder and the record declaration of the appellants that they claimed both under the lien and as bondholders under the mortgage which their petition of November, 1902, expressly declared covered this property. The purchasers at such foreclosure sale, although representing the general creditors, as well as the general creditors

themselves, have the right to the same protection which the receiver had in respect of these proceedings.

The property did not sell at foreclosure for sufficient sum to reimburse the receiver and his expenses. The general creditors and bondholders lost *all*. The appellant had received $10,000 and now seeks to recover the material delivered or its equivalent value.

Respectfully submitted,

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